PB Securities Sdn Bhd v Autoways Holding Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO B-02-57 OF 2000
SHAIK DAUD, SITI NORMA YAAKOB AND DENIS ONG JJCA
11 AUGUST 2000

Companies and Corporations *— Arrangement, scheme of — Creditors' meeting — Who is a scheme creditor — Repeated acknowledgements of appellant as scheme creditor — Appellant invited to produce confirmation of debts — Appellant listed as scheme creditor in application for restraining order under s 176 of Companies Act 1965 — Whether appellant entitled to attend and vote as unsecured creditor at unsecured creditors' meeting — Whether estoppel can be raised — Whether legitimate expectation applies — Whether votes taken without appellant's presence null and void*

The appellant had offered a margin facility of RM50m to Autoways Development Sdn Bhd, a wholly owned subsidiary of the respondent. The respondent, as the parent company of the borrower company, gave a corporate guarantee in favour of the appellant. By early 1998, the respondent and its group of companies were facing financial difficulties and a restructuring scheme of arrangements was prepared for submission to the court under s 176 of the Companies Act 1965 ('the Act'). The proposal dated 21 May 1998 was put forward by the respondent to the court when the respondent applied for an ex-parte restraining order under s 176(10) of the Act where the appellant was listed as one of the scheme creditors. The restraining order was served on the appellant on 26 May 1998. On 7 December 1998, the respondent submitted a restructure proposal to the appellant for its consideration. On 8 September 1999, a third and final proposal was sent to the appellant which is construed as an invitation to the appellant to attend and vote at the creditors' meeting as a scheme creditor. Based on this notice of meeting, a proxy form dated 27 September 1999 was filed in which the appellant indicated its desire to vote against the scheme. On 30 September 1999, the appellant was excluded from the scheduled meeting as well as the adjourned meeting on 10 November 1999. On 10 November 1999, the respondent claimed to have obtained the requisite $^{3}/_{4}$ majority, approving the restructuring scheme. The appellant applied for a declaration that the appellant was a scheme creditor of the respondent and was entitled to attend and vote as an unsecured creditor at the unsecured creditors' meeting of the respondent. The learned High Court judge held that there were serious competing views as to whether the appellant was a scheme creditor and this, he held, would depend on whether the appellant's claim by way of proof of debt was recognized and admitted by the respondent. This being a serious bona fide issue could only be resolved by way of a full trial.

Held, allowing the appeal:

(1) The learned judge completely ignored the order issued by the court dated 25 May 1998, restraining the appellant from suing the

respondent on the guarantee. The appellant could not prove its claim by way of a trial (see p 425A). The words 'in a summary way' appearing in s 176(1) and (10) of the Act clearly mean that the sanctioning court acting under that section is entitled to deal with every issue in respect of the scheme of arrangement in a summary way. There was no necessity for a protracted trial of the debt (see p 425B–C).

(2) The restructuring scheme itself acknowledged the appellant as a scheme creditor and even invited the appellant to produce certain confirmations of the debt. The learned judge also ignored the evidence that when the respondent applied for the restraining order, they listed the appellant as one of 24 scheme creditors to be involved in the restructure exercise (see p 425D–E).

(3) In the light of the repeated acknowledgements of the appellant as a scheme creditor, the learned judge ought to have applied the doctrine of estoppel against the respondent. The respondent had, by their words and conduct, allowed and even to a certain extent, encouraged the appellant to proceed on the basis and understanding that the respondent had accepted the appellant as a scheme creditor. The respondent had, therefore, led the appellant to harbour a legitimate expectation that it was a scheme creditor, and it would be unconscionable and unjust for the respondent to assert otherwise. The respondent ought not to be allowed to approbate and reprobate (see pp 425H–426A).

(4) By obtaining the restraining order preventing the appellant from pursuing its legitimate claim in a court of law, the respondent had abused the process of the court to achieve another purpose. The respondent had also abused the purport of s 176 of the Act and to exclude the appellant and to prevent it from exercising its statutory right to vote were not mere procedural irregularities but illegalities so as to render null and void the votes taken at the adjourned unsecured creditors' meeting of 10 November 1999 (see pp 426I–427A).

[Bahasa Malaysia summary

Perayu telah menawarkan kemudahan margin sebanyak RM50 juta kepada Autoways Development Sdn Bhd, sebuah anak syarikat yang dimiliki sepenuhnya oleh responden. Responden, sebagai syarikat induk bagi syarikat peminjam, telah memberikan satu gerenti korporat atas nama perayu. Pada awal tahun 1998, responden dan kumpulan syarikatnya menghadapi masalah kewangan dan satu skim pengaturan penyusunan semula telah disediakan untuk dikemukakan kepada mahkamah di bawah s 176 Akta Syarikat 1965 ('Akta tersebut'). Cadangan bertarikh 21 Mei 1998 telah dikemukakan oleh responden kepada mahkamah ketika responden memohon untuk mendapatkan

satu perintah menghalang ex parte di bawah s 176(10) Akta tersebut di mana perayu telah disenaraikan sebagai salah satu daripada pemiutang-pemiutang skim tersebut. Perintah menghalang itu telah disampaikan ke atas perayu pada 26 Mei 1998. Pada 7 Disember 1998, responden telah mengemukakan satu cadangan pembentukan semula kepada perayu untuk pertimbangannya. Pada 8 September 1999, satu cadangan ketiga dan muktamad telah dikirimkan kepada perayu yang ditafsirkan sebagai satu jemputan kepada perayu untuk menghadiri dan mengundi di mesyuarat pemiutang-pemiutang sebagai pemiutang-pemiutang skim tersebut. Berdasarkan notis mesyuarat ini, satu borang proksi bertarikh 27 September 1999 telah difailkan dalam mana perayu telah menunjukkan keinginannya untuk mengundi terhadap skim tersebut. Pada 30 September 1999, perayu telah dikeluarkan dari mesyuarat yang dijadualkan dan juga pada mesyuarat yang telah ditangguhkan pada 10 November 1999. Pada 10 November 1999, responden menuntut telah memperolehi majoriti $^{3}/_{4}$ yang diperlukan, yang meluluskan skim penyusunan semula tersebut. Perayu telah memohon satu pengisytiharan bahawa perayu merupakan pemiutang skim responden dan berhak untuk menghadiri dan mengundi sebagai pemiutang tak bercagar di mesyuarat pemiutang-pemiutang tak bercagar responden. Hakim Mahkamah Tinggi memutuskan bahawa terdapat pandangan-pandangan bertentangan yang serius berhubung dengan sama ada perayu merupakan pemiutang skim dan ini, beliau memutuskan, akan bergantung sama ada tuntutan perayu melalui bukti hutang telah diiktirafkan dan dimasukkan oleh responden. Oleh kerana ini merupakan isu bona fide yang serius, ia hanya boleh diselesaikan melalui satu perbicaraan penuh.

Diputuskan, membenarkan rayuan tersebut:

(1) Hakim yang arif tidak menghiraukan langsung perintah bertarikh 25 Mei 1998 yang dikeluarkan oleh mahkamah, yang menghalang perayu daripada mendakwa responden ke atas gerenti tersebut. Perayu tidak dapat membuktikan tuntutannya melalui satu perbicaraan (lihat ms 425A). Perkataan-perkataan 'in a summary way' yang terdapat dalam s 176(1) dan (10) Akta tersebut jelas bermaksud bahawa mahkamah yang bertindak di bawah seksyen itu berhak untuk menguruskan setiap isu berhubung dengan skim pengaturan tersebut secara ringkas. Adalah tidak perlu untuk mengadakan satu perbicaraan bagi hutang yang berlanjutan (lihat ms 425B–C).

(2) Skim penyusunan itu sendiri mengesahkan perayu sebagai pemiutang skim tersebut dan telah pun menjemput perayu supaya mengemukakan pengesahan-pengesahan tertentu mengenai hutang tersebut. Hakim yang arif juga tidak menghiraukan keterangan bahawa ketika responden memohon untuk mendapatkan perintah menghalang, mereka telah menyenaraikan

perayu sebagai salah satu daripada 24 pemiutang-pemiutang skim yang akan terlibat di dalam perlaksanaan penyusunan semula tersebut (lihat ms 425D–E). A

(3) Memandangkan pengesahan berulangan mengenai perayu sebagai pemiutang skim, hakim yang arif sepatutnya memakai doktrin estopel terhadap responden. Responden tersebut telah, melalui perkataan-perkataan dan perlakuan mereka, membenarkan dan sehingga pada satu tahap, menggalakkan perayu untuk meneruskan atas dasar dan kefahaman bahawa responden telah menerima perayu sebagai pemiutang skim. Responden telah, dengan itu menyebabkan perayu menyimpan harapan yang sah bahawa ia adalah merupakan pemiutang skim, dan adalah tidak berpatutan dan tidak adil bagi responden untuk menegaskan sebaliknya pula. Responden tidak seharusnya dibenarkan untuk approbat dan reprobat (lihat ms 425H–426A). B C

(4) Dengan memperolehi perintah yang menghalang perayu daripada meneruskan tuntutannya yang sah dalam sebuah mahkamah undang-undang, responden telah menyalahgunakan proses mahkamah bagi mencapai tujuan yang lain. Responden telah juga menyalahgunakan maksud s 176 Akta tersebut dan perbuatannya mengecualikan perayu dan menghalangnya daripada melaksanakan hak berkanunnya untuk mengundi bukannya hanya luar aturan prosedur tetapi adalah kepenyalahan undang-undang hinggakan menjadikan undi yang diambil di mesyuarat pemiutang-pemiutang tak bercagar bertarikh 10 November 1999 tak sah dan batal (lihat ms 426I–427B).] D E

F

Notes

For cases on scheme of arrangment generally, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 18–24.

G

Cases referred to

Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd [1981] 3 All ER 577 (refd)

Chor Phaik Har & Ors v Choong Lye Hock Estates Sdn Bhd & Ors [1996] 2 MLJ 206 (refd)

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Legislation referred to

Companies Act 1965 s 176, (1), (3), (10)

Courts of Judicature Act 1964 s 69(4)

I

Appeal from: Originating Summons No MT3–24–402 of 1998 (High Court, Shah Alam)

A *Cyrus Das* (*Benjamin Dawson* and *Tan Chia Loong* with him) (*Nik Hussain & Partners*) for the appellant.

William Leong (*William Leong*) for the respondent.

Shaik Daud JCA (delivering judgment of the court): This was an appeal against the dismissal by the Shah Alam High Court of the appellant's B application for a declaration that the appellant was a scheme creditor of the respondent and was entitled to attend and vote as an unsecured creditor at the unsecured creditors' meeting of the respondent.

The appellant, a fully owned subsidiary of Public Bank Bhd, is a licensed stock broking firm. The appellant had by a letter of offer dated C 7 October 1997, offered a margin facility of RM50m to Autoways Development Sdn Bhd, a wholly owned subsidiary of the respondent. A formal agreement was executed the same day and at the same time too, the respondent, as the parent company of the borrower company, gave a corporate guarantee in favour of the appellant. All these have not been disputed.

D

By early 1998, it became obvious that the respondent and its group of companies were facing financial difficulties and unable to settle their debts. As a result in May 1998, they engaged Messrs Arthur Andersen Corporate Advisory Sdn Bhd ('Arthur Andersen') a reputable firm of accountants to prepare a restructuring scheme of arrangements with their numerous E creditors for submission to the court under s 176 of the Companies Act 1965 ('the Act'). Arthur Andersen came out with a proposal dated 21 May 1998. This proposal recognised the appellant as a scheme creditor, and confirmed by the affidavit of the respondent's managing director one Chua Sin Han, affirmed on 21 May 1998. This fact was also confirmed in an internal document of the respondent as averred to by the managing director F of the respondent in the same affidavit at para 9 thereof.

There can be no doubt that these two documents constitute complete acknowledgement that the appellant was a creditor.

The Arthur Andersen proposal dated 21 May 1998 was put forward by the respondent to the court when the respondent applied for an ex-parte G restraining order under s 176(10) of the Act on 22 May 1998, where the appellant was listed as one of the scheme creditors. The restraining order was served on the appellant on 26 May 1998. It is submitted that this in itself is an acknowledgement that the appellant was one of the scheme creditors, otherwise there was no reason whatsoever to serve the restraining order on the appellant. H

This was followed on 9 June 1998 by the respondent asking the appellant to submit its claims of the debt owing for the purpose of the scheme. This request is contained in a letter dated 9 June 1998, from the respondent's managing director one Chua Sin Han addressed to the appellant. There has been no denial of this. It is submitted that this act of I the respondent is an unqualified acknowledgement as the respondent had not reserved the right to reject the appellant's claim nor was the letter written 'without prejudice'. It is, we think, pertinent to reproduce this letter.

9 June 1998

PB Securities Sdn Bhd
22 Floor, Menara Panglobal
No. 8, Lorong P Ramlee
50250 Kuala Lumpur.

Dear Sirs,

Re: Outstanding Amount due:
(1) Autoways Construction Sdn Bhd
(2) Autoways Holdings Bhd

Shah Alam High Court Order No MT3-24-402-1998

We refer to the restraining order under s 176(10) of the Companies Act 1965 given by the High Court dated 22 May 1998.

You are now required to forward a 'statement of claim: of the debt due to you as at 31 May 1998' in order to assist our financial advisers and corporate lawyers to work out all actual and contingent liabilities so as to complete the scheme of arrangement and compromise.

We wish to inform that if you fail to submit the said 'statement of claims as 31 May 1998' by the 30 June 1998, you may not be considered in our scheme of arrangement and compromise restructuring exercise because of the time constraint we have to determine the total extent of the liabilities.

Therefore, we urge you to reply to us as soon as possible to enable us to finalise the scheme. If you have any queries, please do not hesitate to contact our Ms Melissa or Ms Jackie.

Your prompt action to the above is much appreciated.

Yours faithfully,
AUTOWAYS CONSTRUCTION SDN BHD

(this is a computer generated print out, no signature required)

CHUA SIN HAN
Managing Director.

The contents of this letter speak for itself.

Accordingly and in response to the request, the appellant submitted its claim by hand vide covering letter dated 26 June 1998, claiming RM50,596,678.07. This was received and acknowledged by the respondent's credit manager one Nooraini Ashaari. There was no rejection of this claim nor was there any other response.

On 15 September 1998, the appellant sued the principal borrower Autoways Development Sdn Bhd for RM51,681,264.14 and interest.

The respondent failed to submit a scheme to the creditors within the requisite six months as ordered by the restraining order. On 19 October 1998 they applied ex-parte for an extension of the restraining order for another six months and this was granted on 19 November 1998. Consequently on 7 December 1998, for the very first time the respondent submitted a restructure proposal to the appellant for its consideration. This was the first proposal. It is submitted that this is yet an unqualified acknowledgement of the appellant as a scheme creditor. A further

A acknowledgement can be seen from a letter dated 2 March 1999 from the respondent to the appellant, acknowledging a meeting between the appellant and the respondent's consultants of 9 February 1999 and requesting the appellant's assistance to provide inforrnation on the following:

B (1) the principal and interest amount outstanding as at 31 December 1997;

(2) a breakdown of monthly interest and other charges from 1 January 1998 to 31 December 1998;

(3) confirmation on the shares of collateral, amount and value sold since
C 31 December 1997.

By another letter dated 21 April 1999 to the appellant, the respondent confirmed another meeting between their consultant and the appellant where the scheme was discussed.

Then by a letter dated 5 May 1999, the respondent's solicitors
D submitted an amended restructuring scheme to the appellant's solicitors, 'for your client's consideration in settlement of the above matter'. This was the second proposal. In this proposal the appellant was again listed as a creditor.

By a court order obtained by the respondent ex-parte on 19 May 1999,
E the respondent were allowed to call separate meetings of separate classes of creditors for approval of the re-structuring scheme, and at the same time obtained a further six months extension of the court order dated 19 November 1999. On 8 September 1999, a third and final proposal was sent to the appellant, by which act it is construed as an invitation to the appellant to attend and vote at the creditors' meeting as a scheme creditor.

F The fact that the final proposal was sent to the appellant has not been denied and this is adverted to in the affidavit of one Yong Yoong Fa, the chief operating officer of the appellant, affirmed on 13 October 1999.

The final proposal carried a definition of an unsecured creditor as:

> G The class of creditors which include stock broking firms which have provided margin financing to ADSB and financial institutions who have extended credit facilities to ACSB against corporate guarantees of AHB.

It cannot be gainsaid that, the above definition fits the appellant to a T. The meeting for the unsecured creditors was to be held at 10am on 30 September 1999. The total amount of the debt was RM112,026,000
H and this included the RM50,597,000 due to the appellant. Based on this notice of meeting a proxy form dated 27 September 1999, was filed in which the appellant indicated its desire to vote against the scheme. Such negative vote would be fatal to the respondent as the respondent would not be able to secure the requisite $^3/_4$ value of creditors in order to endorse the scheme. The appellant represented 45.2% of the total value of unsecured
I debt of RM112,026,000. Upon receipt of the proxy form, the respondent's solicitors contacted the appellant's solicitors to seek a postponement of the scheduled meeting with a view of exploring whether the appellant had any

proposal for a better offer. This is reflected in the Yong Yoong Fa's affidavit referred to earlier. The appellant refused a postponement and the next day, the day of the scheduled meeting, the appellant's proxy representative was excluded from the meeting. It would appear that one day before the scheduled meeting of the unsecured creditors, on 29 September 1999, the respondent board of directors held an emergency meeting whereby they resolved to oppose the claims specifically by the appellant and one other creditor. This decision came after the respondent received the proxy document indicating the appellant's intention to vote against the restructuring scheme. Accordingly on 30 September 1999 the appellant was excluded from the scheduled meeting as well as the adjourned meeting on 10 November 1999.

From the facts adumbrated above, it seems obvious that from the beginning the respondent agreed and accepted the appellant as one of their unsecured scheme creditors but the moment they realised that the appellant intended to vote against the scheme, the respondent made an about turn and rejected the appellant as an unsecured creditor.

As a result of this, on 13 October 1999 the appellant applied in the Shah Alam High Court to intervene in the proceedings for the approval of the scheme. On 10 November 1999, however, the various other meetings of the various classes of creditors proceeded as scheduled and the respondent claimed to have obtained the requisite $^{3}/_{4}$ majority, approving the restructuring scheme. Based on this premise, the respondent purported to apply to the High Court for the formal approval of the scheme under s 176(3) of the Act.

Based on the final proposal, there was justification for the appellant to vote against the scheme. If the scheme was sanctioned by the court, unsecured creditors like the appellant, would have to give up 55% of their debt, as well as all interests due and in return would be left with a mere 45% of the debt whilst in turn would be settled by the issue of redeemable convertible preference shares in the respondent. This to our mind would be most unfair on the appellant who would have to voluntarily give up 55% of the debt and compulsorily take up 45% of shares in the respondent. To make matters worse, after that, a permanent moratorium is imposed on all legal proceedings in respect of the debt. In other words the appellant is compulsorily asked to compromise 45% of the debt in shares in the respondent, which may not be worth 45% of the debt.

The respondent raised no objection to the appellant intervening but at the hearing of the prayers in the application the appellant, elected to proceed only on one prayer, namely whether it was a scheme creditor and whether the restraining order issued by the court on 25 May 1998, ought to be discharged. Both parties agree that these two issues would decide the outcome of the scheme.

The learned high court judge whilst allowing the appellant to intervene, held that there were serious competing views as to whether the appellant is a scheme creditor and this, he held, would depend on whether the appellant's claim by way of proof of debt, was recognized and admitted by

A the respondent. This he held, being a serious bona fide issue could only be resolved by way of a full trial. The learned judge completely ignored the order issued by the court dated 25 May 1998, restraining the appellant from suing the respondent on the guarantee. Therefore, having been thus restrained, how could the appellant be required to prove its claim by way of a trial?

B

The learned judge also made reference to a so called bona fide dispute of the debt which could only be resolved at a trial. We find that this reference goes smack against the purport of s 176 proceedings. The learned judge appeared to have lost sight of the words 'in a summary way' appearing in sub-ss (1) and (10). This phrase must clearly mean that the sanctioning C court acting under that section is entitled to deal with every issue in respect of the scheme of arrangement in a summary way. There is no necessity for a protracted trial of the debt. More so in this particular case where the debt has been repeatedly acknowledged without there being any dispute to it. These repeated acknowledgements, as can be seen from the facts stated above are contained in contemporaneous correspondences as well as in the D respondent's internal documents. It must not be forgotten that the restructuring scheme itself acknowledged the appellant as a scheme creditor and even invited the appellant to produce certain confirmations of the debt. After being furnished with such information, no objection was raised by the respondent. Therefore the question of a bona fide dispute does not arise. The learned judge also ignored the evidence that when the respondent E applied for the restraining order, they listed the appellant as one of 24 scheme creditors, to be involved in the restructure exercise. This document was submitted to the court and formed part of the court order. Therefore in the light of what we have stated we agree with the submission of learned counsel for the appellant that, the learned judge was clearly F wrong in his reasoning when he held that there ought to be a trial of the debt. The learned judge also appeared to have been influenced by the phrase, 'without prejudice' which appeared in the proposal itself. With respect, we are of the view that there is no such thing as a without prejudice proposal under s 176. There is no such thing as a restricted proposal. Therefore we hold that the appearance of that phrase in the proposal makes G no difference, as it has no effect whatsoever on the proposal. It would have been quite simple for the respondent to reject or to question the capacity of the appellant from the very beginning and it was even entitled to omit the appellant from the list as a scheme creditor. Then it may well be justified for the appellant to be excluded from the scheme. This the respondent did not do.

H

We are of the view that in the light of the uncontradicted evidence of repeated acknowledgements of the appellant as a scheme creditor, the learned judge ought to have applied the doctrine of estoppel against the respondent. Up to 20 September 1999, the respondent had, by their words and conduct, allowed and even to a certain extent, encouraged the appellant I to proceed on the basis and understanding that the respondent had accepted the appellant as a scheme creditor. The respondent had, therefore, led the appellant to harbour a legitimate expectation that it was a scheme

creditor, and it would be unconscionable and unjust for the respondent to assert afterwards that the appellant was not. In other words, the respondent ought not to be allowed to approbate and reprobate. We refer to 16 *Halsbury's Law of England* (4th Ed) para 1507:

> Approbation and reprobation. On the principle that a person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel in pais. The principle that a person may not approbate and reprobate expresses two propositions: (1) that the person in question, having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile; and (2) that he will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent.

In *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1981] 3 All ER 577, the court approved the following passage from Spencer Bower and Turner on *Estoppel by Representation* (3rd Ed) 1977 at p 591:

> This form of estoppel is founded, not on a representation of fact made by a representor and believed by a representee, but on an agreed statement of facts the truth of which has been assumed, by the convention of the parties, as the basis of a transaction into which they are about to enter. When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped as against the other from questioning the truth of the statement of facts so assumed.

The writer describe such an estoppel as an estoppel by convention.

See also *Chor Phaik Har & Ors v Choong Lye Hock Estates Sdn Bhd & Ors* [1996] 2 MLJ 206. We are of the view that in the present case there were sufficient material before the learned judge for him to hold that it would be unconscionable and unjust to allow the respondent to resile from their course of conduct and by such conduct is estopped from denying that the appellant is an unsecured creditor.

It is also our view that the respondent had practised a deception on the court. Having earlier obtained the restraining order on the basis of including and asserting in no uncertain terms that the appellant who was the principal unsecured creditor, was a scheme creditor, the respondent later made an about turn to exclude the appellant from voting at the unsecured creditor's meeting. From the outset, ie the date of obtaining the restraining order, the respondent already had in their possession all the facts of appellant's status as a scheme creditor therefore there was no earthly reason for them to make this about turn. From the evidence available it seems clear to us that the respondent's decision to exclude the appellant, which was only made on 29 September 1999 ie on the eve of the scheduled creditors' meeting, was solely made to prevent the appellant from voting against the scheme. By obtaining the restraining order preventing the appellant from pursuing its legitimate claim in a court of law, the respondent had abused the process of

A the court to achieve another purpose. By their act to prevent the appellant from the unsecured creditors' meeting, the respondent had also abused the purport of s 176 of the Act. In the circumstances of the case, it is our view that to exclude the appellant and to prevent it from exercising its statutory right to vote were not mere procedural irregularities but illegalities so as to render null and void the votes taken at the adjourned unsecured creditors' B meeting of 10 November 1999.

On behalf of the respondent it was submitted that on the totality of the facts of the case, it would be unconscionable for the appellant to succeed and that the doctrine of estoppel does not apply. It was contended that the appellant was guilty of fraud and that there was a conspiracy. It was C submitted that the principal borrower, Autoways Development Sdn Bhd was at all material times not the recipient of the facility provided by the appellant. With respect, we find it difficult to accept such a contention. As stated earlier, at the very outset ie at the time they obtained the restraining order, the respondent were already in possession of all the facts of the appellant's status and yet the respondent elected to include the appellant as D a scheme creditor, therefore, the respondent ought not to be allowed to cry conspiracy and fraud at this late stage, a fortiori when they knew that the appellant was going to vote against the scheme. Therefore, we find no merits in the respondent's submission of conspiracy and fraud at this stage of the proceedings.

E In the light of the above, we allowed the appeal with costs here and below and ordered the refund of the deposit to the appellant. At this stage learned counsel for the respondent informed the court that in view of the expenses involved, the respondent would not be holding a fresh meeting of unsecured creditors and were prepared to accept that the appellant had voted against the scheme and the consequence of which is that the F restructuring scheme would not be carried out. By consent of both parties, we also made a consequential order to the effect that acting under s 69(4) of the Courts of Judicature Act 1964, we declared the creditors' meeting for unsecured creditors under Scheme A held on 10 November 1999 to be invalid.

G *Appeal allowed.*

Reported by Benjamin Yong

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I